

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEW YORK UNIVERSITY
Employer
and

Case 02-RC-023481

GSOC/UAW
Petitioner

POLYTECHNIC INSTITUTE
OF NEW YORK UNIVERSITY
Employer
and

Case 29-RC-012054

INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE,
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
Petitioner

**PETIONER'S REPLY BRIEF TO THE BRIEF OF NEW YORK
UNIVERSITY**

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PETITIONER'S REPLY BRIEF TO THE BRIEF OF NEW YORK UNIVERSITY

I. INTRODUCTION

This petition involves a bargaining unit that was previously represented by the Petitioner. From 2000 until 2005, the UAW represented a unit of graduate assistants employed by NYU. That unit was comprised of student employees in three broad categories: student employees who taught, classified as Teaching Assistants ("TAs"); student employees who conducted research, classified as Research Assistants ("RAs"); and student employees who performed a variety of other tasks, classified as Graduate Assistants ("GAs"). In general, these employees were all enrolled as graduate students at NYU, performed services for NYU that were related to their graduate education, and received payment for performing those services in the form of a "stipend" from NYU. Excluded from this unit were RAs in the physical sciences whose research was supported by grants from external funding sources such as the United States government. Also excluded were graduate students who taught classes but who had exhausted the stipends that the Employer offered and who were therefore compensated in the form of a salary rather than a stipend.

While the Board exercised jurisdiction over graduate student employees, the parties successfully negotiated a collective bargaining agreement. After that contract had expired, the Employer seized upon the holding of Brown University, 342 NLRB 483 (2004) that graduate student assistants are not employees and withdrew recognition. In 2009, evidently anticipating that the Board would reconsider the Brown decision because of the absence of any basis for its holding, the Employer embarked upon a reclassification scheme which obscured the identities of many of the student employees who are now filling the roles formerly held by unit employees. The Union filed the

instant petition for an election to enable graduate students employees of NYU to decide whether they wish to re-establish the bargaining relationship that had functioned successfully during the first five years of the millennium. These are employees who would be represented today had the Board not pulled the rug out from under their bargaining relationship. The Union does not seek to force the Employer to grant recognition based solely on that bargaining history. The Petitioner is merely seeking to allow these employees to vote, for a second time, to form a Union. The Employer seeks to prevent that election from being held.

The Acting Regional Director for Region Two issued a decision in which he identified, as nearly as possible, the student employees who are now filling the roles previously filled by former bargaining unit employees. He concluded that, if an election were to be held, RAs funded by external grants should be permitted to vote because the record of this case, unlike the record in New York University, 332 NLRB 1205 (2000) ("NYU I"), establishes these RAs "are performing services for pay" for NYU (Dec. at 27). He found that all of these employees continue to share a community of interest because they do work for the university which is related to and in furtherance of their education. Their dual status as employees and students is what sets them apart from other employees and establishes their separate community of interest.

Nevertheless, the Acting Regional Director dismissed the petition on the authority of Brown, which held categorically that "graduate student assistants are not employees." 342 NLRB at 493. The Board in Brown defined "graduate student assistants" as individuals "who perform services at a university in connection with their studies...." 342 NLRB at 483. As the Regional Director recognized, all of the employees sought by the

Petitioner are graduate student assistants under this definition, despite the fact that the Employer no longer uses titles such as TAs and GAs. The Petitioner filed a Request for Review of the dismissal of this petition, asking the Board to overrule Brown and order an election in a unit of student employees. The Board granted review and issued an order permitting the parties to file briefs to address certain questions raised in the above-captioned cases, both of which raise the issue of whether there is any legal basis for the Brown decision. While the Petitioner filed a single brief addressing the questions posed by the Board, the Employer's attorney filed separate briefs on behalf of NYU and of Polytechnic Institute of New York University, respectively. This brief is submitted in reply to the brief submitted by NYU.

II. NYU's ARGUMENTS DEMONSTRATE THE ABSURDITY AND INDEFENSIBILITY OF THE BROWN HOLDING

Prior to 2009, most NYU graduate students who taught undergraduate students were classified as TAs and compensated for this work through the payment of "stipends" under a financial aid program known as the MacCracken program. (NYU I, 332 NLRB at 1210; Dec. 5, 9).¹ Beginning in the Fall of 2009, the Employer began to eliminate the TA classification. At that time, the largest of the schools within the University, the Graduate School of Arts and Sciences ("GSAS"), implemented "Financial Aid Reform 4" ("FAR 4") which eliminated the connection between teaching and the payment of stipends (Dec. 5-6, 9). Nevertheless, graduate students continued to teach

¹ References to the record shall be as indicated:
 Acting Regional Director's Decision and Order Dismissing PetitionDec. (followed by page number)
 Brief on Review of New York UniversityNYU Br. (followed by page number)
 TranscriptTr. (followed by page number)
 Petitioner's ExhibitsPet. Ex. (followed by exhibit number)
 Employer's ExhibitsEr. Ex. (followed by exhibit number)

for pay. The Employer transferred them from the payroll category for TAs to the payroll category for adjunct faculty and began to call them adjunct faculty (Dec. 1; Tr. 376). The Employer set their salaries based upon provisions of the ACT/UAW collective bargaining agreement (Dec. 14). The Acting Regional Director found that graduate students newly classified as adjuncts continue to perform substantially the same work as they previously performed when classified as teaching assistants (Dec. 15-16). He also found that the reclassification of TAs as adjunct faculty members resulted in the addition of approximately 600 graduate students who perform teaching functions to the adjunct faculty classification (Dec. 13; Charts C & D). The Employer in its reply brief does not dispute this finding.²

As a result of its decision to reclassify TAs as adjunct faculty, NYU now agrees that they are statutory employees (NYU Br. at 28). NYU acknowledge in its brief that the difference between a graduate student adjunct and a TA is whether they are paid by salary or by stipend, stating that “the distinction in those classifications was based only on the nature of the funding.” (NYU Br. at 6). NYU recognizes that graduate students who teach classes in exchange for an adjunct salary perform services under the direction of the Employer in exchange for compensation and therefore are employees. If the compensation comes in the form of a stipend which is part of a student “funding” package, then the Employer would argue that this same individual, performing the same duties under the same supervision, was “primarily a student” and therefore not an employee. This discloses the artificiality of excluding employees from the protection of the act merely because they are also students at the institution that employs them. By

² A similar program was implemented elsewhere within the University in the Fall of 2010, resulting in the reclassification of more TAs as adjunct faculty (Dec. 12.fn.10).

this segregation of the payment made to student employees for the work they perform, the Employer has demonstrated that it is possible to treat their economic relationship to the university as distinct from their status as student.

NYU attempts to justify its absurd argument by claiming that the reclassification of TAs as adjuncts “separated, to the greatest extent possible, the work done by graduate students as teachers from their other activities as students.” Before turning to a discussion of the points made by the Employer to explain this “separation,” it is worth pausing for a moment to recognize the significance of this statement. NYU has admitted that graduate students who teach do “work” for the university. It has also recognized that this work relationship is something that can be separated from the student relationship. In other words, the Employer has acknowledged the central fallacy of Brown. The Employer, by its statements and its conduct in reclassifying these individuals, has demonstrated that the same individual can be both student and employee, and that the employee relationship can be treated separately.

NYU’s explanation as to how it “separated” the work done by graduate students who teach from their role as students further reveals that the two roles are, in fact, distinct, and that it is possible to engage in collective bargaining with respect to the one without affecting the other. NYU makes three arguments in bullet pointed paragraphs to explain how it has created this separation between the work of graduate student teachers and their status as students. A consideration of these three bullet points confirms that all NYU has done is to change the titles given to graduate students who teach and to change the name given to the compensation paid to them. If that is all it takes to make it possible for these student employees to engage in collective bargaining

without impacting their role as students, then collective bargaining with respect to graduate student assistants present no risk to their status as students.

The first bullet point argument (at pp. 29-30) is that NYU students now receive stipends that are separate from their adjunct salaries, while the TAs in Brown and NYU I received stipends in semesters when they worked and in semesters when they were not required to work. In the very next paragraph, however, the Employer points out that the TAs in Brown and NYU I were required to teach in order to receive their stipends. Thus, like TAs, graduate student adjuncts are required to teach in order to receive their pay. In either case, students perform work in exchange for compensation. All that has changed is the form of the payment.

Moreover, while evidence on this point is somewhat complicated, the record demonstrates that, as a factual matter, there continues to be a strong connection between teaching and the payment of stipends. It was very common prior to FAR 4 for students to receive TA appointments into their sixth and seventh years, and to receive full funding packages including stipends during those years, even though they had been guaranteed funding for only five years when they were admitted. (Tr. 452, 1083, 1342, 1351, 1359, 1435). This was done because the University recognized that students commonly require more than five years to complete their dissertations, and they need stipends to survive during that period. The creation of FAR-4 does not magically enable students to earn their doctorates within five years. FAR-4 does mean that they are no longer able to extend their funding packages by taking positions as TAs, because the TA position no longer exists. Instead, post-FAR-4, students can take positions as adjunct faculty.

However, one semester pay for an adjunct position is only about $\frac{1}{2}$ of the amount of a stipend for a semester and does not include the other elements of a MacCracken funding package (Tr. 457, 1429; ER. Ex. 12(a), 13). To make up the shortfall in funding created by FAR-4, students who teach during their MacCracken years are offered the opportunity to place a portion of their MacCracken stipend in a "reserve" to use in later years (Dec, 10; Er. Ex. 11, pp. 9-11). Under this Fellowship Reserve program, "students may choose to use the additional compensation they receive for teaching ... to reserve portions of their MacCracken stipend for later use." (Er. Ex. 11, p. 10). The program requires students to reserve their stipends in increments of one-quarter of a year's stipend (Ibid). This one-quarter increment would be roughly equal to the amount the student was earning from one semester of an adjunct appointment. The Fellowship Reserve program is thus designed to enable the student to coordinate the payment of stipends with earnings from teaching positions. (Tr. 457, 670).

From a financial perspective, this puts the typical student who was required to teach four semesters to receive MacCracken funding before FAR-4, and who was supported for seven years, in the same position as he would have been before FAR-4. A student can now reserve one-quarter of his stipend for each class that he teaches. If the student teaches four semesters during his five MacCracken years, his reserve will provide funding for a sixth year. If the student teaches during the sixth and seventh years (which he would have been required to do in order to earn a stipend as a TA), then he can earn the equivalent of an additional one-quarter of a stipend in each semester, providing him with funding for the seventh year. The student thus receives the same compensation he would have earned had he served as a TA for the same

number of semesters prior to FAR-4. (Tr. 1412-13, 1429-30). The only difference is that he is now in payroll code 112 instead of code 101.

The expectation that students will continue to require support from NYU for seven years is reflected in other elements of the MacCracken funding program. The Employer pays the premiums for NYU Student Health Insurance for up to two years beyond the MacCracken term, or seven years in most instances. (Er. Ex. 11, p. 4). Matriculation Fees are remitted for two years beyond the MacCracken term. (Ibid). Thus, the entire Plan is designed to provide the same amount of support that student employees received prior to FAR-3, for the same period of time. The only difference is that payments for teaching appear in a different payroll code.

The Employer has taken another step that preserves the link between MacCracken funding and the compensation of students reclassified as adjunct faculty. As noted above, the pay for an adjunct for teaching one class for one semester is approximately equal to one-quarter of a MacCracken stipend, or one-half of a semester's stipend. Before FAR-4, students in their sixth and seventh years commonly received appointments as TAs, so that they continued to receive stipends equivalent to the stipends received by MacCracken fellows. Under FAR-4, students who teach to maintain support in their sixth year are appointed as adjuncts, performing the same duties as before, but receiving half the pay. While maintaining the fiction that these sixth and seventh year students are being paid as adjuncts, the Employer has instituted a program of "transition funding" for sixth and seventh year students to make up the difference. Students in their sixth and seventh years who are working as adjuncts are provided a stipend payment equal to half of a fellowship, so that the adjunct pay

combined with the half stipend payment is roughly equal to the stipend amount received by a MacCracken fellow (Tr. 1344, 1359-60, 1537-38; Pet. Ex. 50, 51, 52, 53). The “transition funding” therefore makes up the difference between the adjunct pay and the amount the student worker would have received as a TA. As Associate Dean for Graduate School Enrollment Services Roberta Popik put it, adjunct pay and the half fellowship transition payment “combined would be equivalent or possibly higher than what they ... would have received if they had been ... on a teaching assistantship in the past.” (Tr. 1538). As noted above, these student employees perform the same duties that they previously performed as TAs. (Tr. 1343, 1363). Thus, they perform the same work and receive approximately the same pay. They just have been moved to a different payroll code. There is nothing in this change of payroll code that would separate their work from “their other activities as students.” All this demonstrates is that it is possible to deal separately with the economic aspects of the relationship.

The other bullet point arguments made by the Employer to support its claim that work as a graduate student adjunct is less related to student status than work as a TA are similarly flimsy. The Employer points out that teaching was required of all graduate students at Brown and at the time of NYU I, while graduate students are not required to teach as a condition to receiving their stipends. As discussed above, the financial aid system continues to be structured in such a fashion to pressure students to work as adjuncts in order to fund their educations. In any event, the fact that teaching is not directly linked to the payment of stipends does not mean that it is any less related to education. The Acting Regional Director made extensive findings that teaching continues to be “an integral component of graduate education” at NYU (Dec. 16). He

cites provisions from student handbooks in a several departments and the testimony of faculty witnesses to establish that teaching remains essential to graduate student education (Dec. 16-17). As Professor Andrew Ross testified, “without teaching, the doctorate is all be worthless.” (Dec. 17; Tr. 1411-12). The Employer does not challenge the Acting Regional Director’s factual finding that work as an adjunct is an element of graduate education. Thus, the fact that teaching is not formally a requirement to receive a degree does not separate the work done by graduate student teachers from their status as students.

The Employer’s third bullet point in support of its claim to have separated employee status from student status is the most transparent of all. “Finally, in Brown and NYU I, the TAs had to be enrolled as students.... Here student status is not required to serve as an adjunct instructor”. (NYU Br. 30). NYU has taken employees in a job classification reserved for students and, without changing their duties, moved them to a job classification which includes non-students. The Employer is willing to concede that they are employees as a result of nothing more than a change in job classification. This discloses the lack of any substance to the claim that graduate student employees are not employees.

The Employer also attempts to argue that the record in the instant case is insufficient to justify reconsideration of Brown. As demonstrated in our initial brief, as well as the *amici* briefs filed by the AFL-CIO, UNITE-HERE and the UE, there is not now and never was any legal or logical support for the Brown decision. It is inconsistent with the language of the statute that it purports to interpret, conflicts with controlling precedent, relies upon a case that has been overruled, distorts prior Board decisions,

postulates that education and employment are somehow inconsistent, and relies upon unsupported speculation about potential harms that the majority imagined might result from collective bargaining. The complete lack of any legal or logical basis for the decision is sufficient basis for setting aside that decision.³ However, the Employer's actions in separating pay for teaching from student status provides for their evidence that the economic relationship between a university and its graduate employees can be dealt with separately from academic issues.

The Employer does argue that the experience with collective bargaining at NYU demonstrated that collective bargaining can harm academic freedom. The Employer points to statements in reports by committees appointed by the University to study the impact of collective bargaining. Those committees claimed that grievances filed by the Union challenged the academic mission of NYU (NYU Br. 34-35). For example, according to the Final Report of the Senate Academic Affairs Committee and Senate Executive Committee of the University, "The Committee considered that the time-consuming and heavy filing of grievances was the most serious disadvantage of the contract." (Er. Ex. 38, p. 8). As reflected in that report, the Union disputed the Employer's claim that it filed grievances that involved academic issues (Ibid, pp. 8-9). The Committee relied upon the testimony of a University administrator that the Union had filed 8 grievances during the 4 year term of the contract that "would have undermined the faculty's decision-making dominion had an arbitrator gone the other way." (Ibid, p. 9). It would seem to be something of an exaggeration to describe 8

³ Thus, it is with perhaps unconscious irony that NYU writes, "There is no need for repetition here of the reasons that those arguments were correctly rejected by the majority opinion in *Brown*. " Presumably NYU's able counsel has chosen not to repeat those arguments because it would be embarrassed to be associated too closely with such faulty logic.

grievances over 4 years as “heavy filing of grievances....”⁴ The report noted that, of those 8 grievances, one was pending when the collective bargaining agreement expired, while the other 7 had been resolved “favorably for the University.” (Ibid, p. 9). Two of those grievances were pursued to arbitration (Er. Ex. 40, 41). The other grievances that the Employer claims posed a threat to academic freedom were therefore resolved ***between the parties*** without resort to arbitration. In other words, the evidence cited by the Employer is consistent with the Union’s position that the parties were able to resolve issues that had some potential impact on academic freedom without resort to arbitration.

The Employer also argues that the academic studies which were made a part of this record fail to establish that collective bargaining does not interfere with student-faculty relations or with academic freedom (NYU Br. 35-36). As stated in our principle brief, the Petitioner believes that those studies do contradict the assumptions relied upon by the Board in Brown. Regardless of the parties’ arguments on that point, one fact is clear. The record establishes that there is no evidence to support the claim made by the majority in Brown that collective bargaining harms academic freedom. Indeed, the Employer’s expert conceded that there is no evidence that unionization of graduate assistants harms the student/faculty relationship or undermines academic freedom. (Tr. 1062).

In conclusion, there are many reasons for the Board to hold that graduate assistants are “employees” within the meaning of section 2(3) the Act. This holding is mandated by the broad language of the statute and by Supreme Court

⁴ This is not to dispute that the Union may have filed a substantial number of grievances that related to employment and compensation issues.

and NLRB decisions which recognize the broad sweep of that language. This holding would be consistent with the Board's long recognition that apprentices can be both students and employees simultaneously. This holding would be consistent with the experience of successful collective bargaining among graduate assistants in the public sector and at NYU itself. This holding is also mandated by the Board decision in Boston Medical Center, 330 NLRB 152 (2000) and St. Barnabas Hosp., 355 NLRB No. 39 (2010), holding that student physicians are statutory employees, as well as the experience of successful collective bargaining among interns and residents as described in the *amicus* brief filed by the Committee of Interns and Residents/SEIU. Finally, this holding is supported by the simple, logical premise that there is no inconsistency between being an employee and being a student. The Employer has made no arguments that would justify depriving graduate student employees of the right to engage in collective bargaining. Accordingly, the Board should reverse Brown and restore collective bargaining rights to academic employees.

III. THE ACTING REGIONAL DIRECTOR CORRECTLY FOUND THAT RAs WOULD BE EMPLOYEES IF BROWN WERE OVERRULED

The Acting Regional Director found that, unlike NYU I, the unit in this case should include science RAs funded by external grants. The Acting Regional Director based this conclusion on the record developed at the hearing, which established facts that were absent from the record in NYU I. In particular, the Acting Regional Director found that research is one of the main priorities of the University, that work performed by RAs funded by external grants fulfills this mission, and that the University benefits from this

work (Dec. 20). He found that, in order to obtain external funding, the University is obligated to provide the funding agency with a grant application that includes a description of the work to be performed by all personnel funded by the grant, including RAs (Dec. 20). The earnings of RAs working under such grants are treated as personnel costs (Dec. 20). If the application is approved, then the Employer is responsible for ensuring that funds are expended consistent with the grant application (Dec. 21). RAs are required to provide twenty hours per week of services in exchange for payment (Dec. 21). Thus, they perform services that benefit the Employer, under the direction and control of the Employer, in exchange for compensation. The Employer does not dispute any of these factual findings. Under the broad, common-law definition of “employee” reflected in section 2(3) of the Act, RAs should therefore be found to be employees. See, e.g., NLRB v. Town & Country Elec. Co., 516 U.S. 85 (1995); Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); Boston Med. Ctr., *supra*.

The Employer makes both a factual and a legal argument that RAs funded by external grants should be found not to be employees. Both arguments are fallacious. The legal argument is that Leland Stanford Junior University, 214 NLRB 621 (1974) and NYU I hold that “RAs who are performing research in connection with their doctoral programs are not employees under the Act.” (NYU Br. 38). As explained in greater detail in our principal brief, those cases do not stand for such a sweeping proposition. Rather the Board concluded that the record in those cases did not establish that the RAs at issue performed services for the university in exchange for compensation (See Brief of the Petitioner filed on July 23, 2012, pp. 27-28). The Acting Regional Director’s findings of fact, as described above, establish that, today, RAs at NYU who are funded

by external grants do perform services for the university, under its direction and control, in exchange for compensation.

The Employer also points to findings by the Acting Regional Director that the conditions under which RAs conduct their research have not changed since NYU I. (NYU Br. at 41). Most of the findings cited by the Employer are taken from portions of the decision where the Acting Regional Director quoted from the self-serving conclusory testimony of certain of the Employer's administrators, who claimed that there had been no changes in the role of RAs since the hearing in 1999. Notwithstanding that testimony, the Employer makes the inconsistent argument that RAs in the social sciences "are indistinguishable" from RAs in the social sciences who do not receive funding from external grants. These RAs were included in the bargaining unit under NYU I, yet the Employer would exclude them now. The Employer cannot have it both ways.

The Regional Director concluded that all of the graduate student employees, including the RAs, have a relationship with the University that "is both academic and economic." (Dec. 6). There is ample evidence to support this finding that RAs, including those funded by external grants, have an economic relationship with the university. The record clearly establishes three important facts. First, by conducting research, RAs funded by external grants produce a product and perform a service that is of value to NYU. Second, they conduct this research under the direction and control of agents of the Employer. Third, they do this in exchange for compensation. Thus, like graduate students who teach for pay, RAs funded by external grants are "employees" within the meaning of the Act.

With respect to the value of research to the Employer, the record reflects that research is central to NYU's mission. (Tr. 263-64, 363, 593-94). As Dean Benhabib testified, "Research is one of the main priorities. We . . . expect our faculty to engage in research and teaching. Our main mission is divided between . . . the education of students, and undertaking research. It is done across all the schools and departments." (Tr. 363). Accordingly, "[t]here is growing recognition at NYU that attaining the objective of 'leading research university' requires research administration infrastructure," and NYU has invested significant resources in increasing its research stature, capacity, and funding. (Tr. 263-64; Pet. Ex. 12; Pet Ex. 13). As Dean Benhabib explained, original research is one of the "products" that NYU generates. "Insofar as rankings are an indication of the quality of good research, the quality of research, universities pay attention because **essentially what we are producing is research** and we want it to be the best we can." (Tr. 435).

RAs funded by external grants help the university to produce this product. Each grant has a PI, who in most cases is a regular faculty member. (Tr. 233, 267). The PI selects the students who will serve as RAs on the grant project. (Tr. at 466-67). When selecting an RA, faculty members are most concerned with hiring individuals who can "do a good job." (Tr. 467). They look for students with interest in "the topic that the faculty member is working on or carrying out the research," who are "bright and capable," and who "have particular skills that are suitable to that particular research" and "have taken the classes that are necessary for that particular research project." (Tr. 466-67). Thus, the criteria that faculty use in hiring RAs are those that any employer looks for when selecting employees: merit and an ability to do the job. It is therefore no

surprise that NYU's own internal literature on grant-funded research categorizes RAs working on such projects as "employees" who draw a "salary" for their services. (Pet. Ex. 16, 19).

Once an RA is hired, he performs work for NYU with all of the indicia of employment. The University is accountable to the funding source for all work done on an externally funded project by RAs. (Dec. 21; Tr. 233-34) The grant itself defines the research that will be performed, and usually specifically provides for RAs to work on the project. (Dec. 20; Tr. 271-72; Pet. Ex. 14). The grant application may also specify "RA salaries" associated with the grant. (Tr. 590; Er. Ex. 22). (Tr. 271-72, 291-92). NYU defines RAs working on externally-funded grant projects as "graduate students whose time is divided between formal study and research." (Pet. Ex. 16, at 2). In addition, the grant designates how much "effort" the RAs will expend on the project. "Effort," for purposes of an external grant, is a designation of how much time the RA will devote to the grant, versus how much time the RA will devote to educational purposes; typically, 100% effort on a grant application means that the RA will devote half of her time to work on the grant, and half of her time to educational purposes such as completing her dissertation. (Tr. 291-92). NYU policy officially permits an RA working at 100% effort to devote 20 hours per week to the grant project, but the record establishes that RAs often spend much more than 20 hours per week working in the laboratory or research installation.⁵ (Tr. 191, 391). When an RA is hired to work on a grant at 100% effort, "that's the student's employment. The student has that job. So the student cannot

⁵ The 20-hour per week limit is due to the fact that many RAs are foreign nationals, and Federal regulations prohibit F-1 and J-1 visa holders from working more than 20 hours per week. (Tr. 322).

teach or do any other activities because the student already has a position.” (Dec, 31-22;Tr. 851-52; Er. Ex. 11, at 7).

Research performed by RAs pursuant to externally funded grants helps to generate income for the university. In addition to the RAs’ salaries and benefits, external grants pay for other personnel costs, including faculty and staff salaries, tools, equipment, and travel costs. (Dec. 20;Tr. 268-69; Pet. Ex. 16; Pet Ex. 19). External grants also reimburse NYU for “facilities and administrative” or “F&A” costs, which are essentially overhead costs that have already been incurred by the University. (Dec, 20; Tr. 264-75, 303; Pet. Ex. 19). One witness testified that F&A costs are typically around 25% of the grant amount, but in at least one grant introduced into the record, F&A accounted for 53% of the grant. (Tr. 274-75, 296; Pet. Ex. 14; Pet. Ex. 19).

Externally-funded grant projects, and the work performed by RAs on such projects, can also lead to intellectual property profits for the University. (Tr. 477). NYU holds the patents for anything created out of research conducted on its campus. (Dec. 21;Tr. 240-42). The profits that NYU makes from intellectual property licensing, like the salary and tuition costs paid to RAs from external grant funds, allow the University to use other funds to further its non-profit educational endeavors. (Tr. 477).

Finally, RAs’ work on externally-funded grant projects can lead to publications. (Dec. 20; Tr. 192-94, 437-38). Faculty are generally co-authors on these publications, to the University’s benefit, because “if they have faculty who are well known and distinguished and published well the university is recognized as being successful in its research initiatives.” (Tr. 438). Accordingly, when RAs funded by external grants

conduct research, they are performing work that helps to generate one of the “products” that NYU exists to create and they provide valuable services to the university.

It is also beyond question that they do so under the direction and supervision of the PI. The PI directs RAs in the performance of their duties, defining the research questions that need to be answered for the grant project. (Tr. 421-22; Er. Ex. 19). The PI also ensures that the RA performs work consistent with the grant, and that the RA is committing “effort” to the project commensurate with the “effort” delineated in the grant. (Tr. 174-75, 196, 278, 280, 894; Pet. Ex. 18, at 6; Pet. Ex. 20, at 4). RAships therefore have a distinct service obligation; they are “defined by a student joining a research project, defined by a professor’s grant, typically an external grant or sometimes an internal grant, and they work on a particular topic. So, it’s defined as support that is associated with funding on research fund.” (Tr. 474). A standard RA appointment letter, introduced into the record by the Employer, states that as a condition of receiving funding as an RA, the RA must “satisfactorily fulfill the assigned research assistant responsibilities and successfully carry out any other responsibilities of your appointment.” (Er. Ex. 21). Similarly, the Steinhardt School’s official Ph.D. funding plan states that RAs “will be required to undertake the work and activities required by the externally funded project as outlined in the grant proposal.” (Er. Ex. 46). Thus, when a student accepts a position as an RA on a grant-funded project, he or she works at the direction of a PI in furtherance of the grant-funded project. (Tr. 421-22; Pet. Ex. 16; Er. Ex. 11, at 6).

The record also leaves little doubt that the stipends paid to RAs from the proceeds of external grants constitute payment for performing this research. The PI’s

duty to ensure that the RA's effort is a reflection of the fact that the RA hired to work on a grant-funded project is compensated for performing work that must be consistent with the grant application. (Tr. 270, 271-72).⁶ RAs are paid a "salary" from the grant funds. (Pet. Ex. 16, at 2; Pet. Ex. 19). These salaries are "regarded by the IRS as 'salary for services rendered,' the income is reported, and W-2 forms are issued annually by the University." (Pet. Ex. 63, at 21). The Employer argues that these payments should not be considered "salary" because the amount of the stipend is the same as that awarded to fellows who are not required to conduct research. (NYU Br. 41). Although RAs typically receive the same amount of funding as Ph.D. students funded by internal fellowships, fellowships are awarded to students "simply to do coursework and conduct their own research." (Tr. 373, 474, 1662-63; Pet. Ex. 37). Fellowships "do not constitute compensation and are therefore granted without the condition of providing any form of service by the student." (Er. Ex. 11, at 3).⁷ RAships, by contrast, "are made with the expectation of students providing up to twenty hours per week engaged in a research project as directed by a faculty member." (Er. Ex. 11, at 6). Thus, RAs provide services for NYU, help to produce one of the products of the university, provide these services under the direction and supervision of agents of NYU, and receive compensation for that work.

⁶ NYU cites an example of a graduate student who allegedly was not informed that he was an RA until the end of the semester, when he was required to provide a report to demonstrate that his work was consistent with the grant application (NYU Br. 27). The fact that he was required to make this report illustrates that the University required him to demonstrate that the work he performed fulfilled the requirements of his job.

⁷ Fellowship funds, although taxable as income, are not reported on a W-2. (Pet. Ex. 63, at 20).

As NYU's attorneys argued in The Trustees of Columbia University, Case No. 2-RC-22,358 (2002), in which the Regional Director found Graduate Research Assistants funded by external grants to be employees:

Here, in sharp contrast to Leland Stanford and NYU I] the record establishes that Columbia's GRAs do provide a service to the University: they perform research and related work that the University is obligated to perform under the terms of its numerous externally-funded research grants.... Furthermore, Columbia's GRAs are recruited to do the work, they perform the work under Columbia's control, and are compensated for the work.... And most significantly, Columbia receives remuneration from a third party [usually a government agency] for the particular research.

(Employer's brief in Columbia at 79, attached hereto as Appendix A) (citations to the record and quotation marks omitted). The record in this case establishes these same factors are present at NYU. In the instant case, as the Employer's attorney argued in Columbia, the record establishes that RAs provide an important service to the University in exchange for 'compensation.' As the Employer's counsel concluded in Columbia, they thereby satisfy the "classic definition of an employee...." (Ibid, Appendix A at 90).

NYU argues in this case that, despite all of this evidence that NYU benefits from the work performed by RAs, the Acting Regional Director was unjustified in finding that NYU has an economic relationship to the RAs because there was insufficient evidence to support his finding that externally funded research has become more important to the university since the time of NYU I. As a factual matter, this argument fails because there is extensive evidence to support the Acting Regional Director. As a legal matter, this argument fails because the record clearly establishes that, regardless of the accuracy of the Board's findings about the situation 12 years ago, RAs at NYU now "satisfy the classic definition of an employee."

Because research is now such an important product of its operations, NYU has three separate administrative offices that assist faculty and staff to obtain external funding for research: the Office of Sponsored Programs (“OSP”), which primarily assists with government grants; the Office of Industrial Liaison and Technology, which assists with corporate and industrial grants; and the University Development office, which helps obtain grants from private foundations. (Tr. 240-42; Pet. Ex. 9). OSP helps faculty and staff identify sources of funding and apply more effectively for grant money. (Tr. 235, 237-38; Pet. Ex. 9). OSP also reviews grant applications, develops grant budgets, and ensures compliance with University and other policies, all in an effort to increase the University’s coffers. (Tr. 236; Pet. Ex. 9). According to the Director of OSP, her office provides this assistance because “it’s part of the mission of the University to promote research.” (Tr. 237)

In addition to OSP’s efforts to increase grant funding, NYU has made significant investments in the research capacity on its campus. (Tr. 257-58). These investments include “new facilities to support faculty scholarship in genomics research and in soft condensed matter physics,” and “major renovations of laboratories in the Silver Center,” which houses the chemistry and biology departments. (Pet. Ex. 10; Tr. 258-59). NYU has also created the Partners Initiative, a push to hire new faculty who “are stars in their fields.” (Tr. 264; Pet. Ex. 10). The Partners Initiative is particularly relevant to research because the Principle Investigators (“PIs”) named on external grant applications are typically faculty members, and the PI’s reputation is one factor in whether the funding is awarded. (Tr. 265-66). NYU also recently commissioned an independent review of its administrative infrastructure for research, which recommends additional investment to

“attain[] the objective of ‘leading research university.’” (Pet. Ex. 12). As a result of NYU’s investment, external funding for research at the University is steadily growing. (Tr. 250). In 1999, when the record in NYU I was developed, the University had externally funded research of around \$60 million. (Pet. Ex. 11; Tr. 255). By 2008, that number had jumped to \$200 million. (Pet. Ex. 11).

Thus, the Acting Regional Director was correct in finding that research funded by external grants has increased in economic importance to the university. However, regardless of the extent of this change, the record of this case, unlike the record in NYU I, establishes that these RAs provide a service to the Employer, produce a product of value to the Employer, work under the direction and supervision of its agents, and receive compensation for doing so. It is possible that these three elements existed in 1999 and were not reflected in the evidence on the record. It is clear that these elements are present today. Therefore, they are employees within the meaning of section 2(3) of the Act.

IV. THE ACTING REGIONAL DIRECTOR PROPERLY INCLUDED RAs AND GRADUATE STUDENTS WHO TEACH CLASSES IN THE SAME BARGAINING UNIT

A. The Acting Regional Director Correctly Found that Graduate Students who were Unilaterally Reclassified as Adjunct Faculty by the Employer were not Accreted to the Adjunct Faculty Bargaining Unit

The Employer argues that, because it now classifies all graduate students who teach classes as “adjunct faculty,” those student workers should be considered to be part of the bargaining unit of faculty members represented by UAW Local 7902. It is undisputed that TAs were represented separately from adjunct faculty in the graduate student bargaining unit represented by the Petitioner and were excluded from the

adjunct bargaining unit (Dec. 7). As noted above at p.4, it is also undisputed that, when it eliminated that TA job classification, the Employer converted about 600 employees who previously would have been classified as TAs into adjunct faculty. The Employer now argues that, because these student employees are in a job classification that falls within the unit description for employees represented by Local 7902, and because the Local 7902 bargaining unit has historically included a relatively small number of graduate students who had exhausted their stipends, its action in reclassifying these employees resulted in their inclusion in the Local 7902 bargaining unit. The Employer cannot unilaterally alter the composition of the Local 7902 bargaining unit simply by reclassifying hundreds of employees, either to add them to the bargaining unit or to remove them from the unit. O.G.S. Technologies, 356 NLRB No. 92 (2011); Bay Shipbuilding, 263 NLRB 1133, 1139-40 (1982).

It is clear that Local 7902 did not agree to the addition of graduate students formerly classified as TAs to the bargaining unit. Local 7902 took several decisive steps to object to the Employer's unilateral reclassification of TAs as adjuncts and its attempt to place these workers in the adjunct bargaining unit. First, on September 8, 2009, as the Fall 2009 semester was getting under way, Local 7902 posted the following message on its website:

It has come to our attention that the NYU Administration is reclassifying graduate employed in teaching positions as 'adjuncts' and claiming they will be covered by the collective bargaining agreement between NYU and Local 7902. NYU has not contacted Local 7902 about this matter and we are currently investigating its actions. ACT-UAW Local 7902 stands in solidarity with GSOC/UAW Local 2110, the Union for teaching, research, and graduate assistants at NYU, in their struggle for recognition and a union contract that guarantees fairness and respect for all NYU graduate employees. If you are a graduate employee and have any question or

have been asked to adjunct, please contact GSOC/UAW Local 2110 immediately.....

(Dec. 11; Pet. Ex. 45, 46; Tr. 1290). Second, Schlemowitz disseminated an e-mail message to Local 7902's executive board and joint council delegates, advising them of the posting of the above message and directing them to refer all NYU graduate students to GSOC/UAW. (Dec. 11; Pet. Ex. 45, Tr. 1287). Third, Local 2110 and Local 7902 drafted and distributed a leaflet to students, reading in part:

GSOC/UAW and ACT-UAW believe that graduate employees - not the NYU administration - deserve the right to determine who represents them. The majority of NYU graduate employees have consistently chosen GSOC/UAW to represent them in collective bargaining. ACT-UAW respects graduate employees' right to self-determination and their choice to join together as graduate employees with common interests to negotiate the best possible contract for ALL of the work graduate employees perform.

ACT-UAW stands in solidarity with GSOC/UAW for their right to collectively bargain with NYU. **ACT-UAW will NOT collect dues or fees at this time from NYU graduate employees who have been unilaterally reclassified by NYU as adjunct faculty.**

(Dec. 11; Pet. Ex. 47) (emphasis in original).

Fourth, Catherine Trafton, then an attorney in the UAW Legal Department, contacted Labor Relations Director Nolan and informed him that the Union objected to the Employer's unilateral action. (Dec. 11; Tr. 723, 769). Thus, there was no agreement that graduate students newly classified as adjunct faculty were part of the Local 7902 bargaining unit (Dec. 27).

The Acting Regional Director analyzed the question of whether these graduate students had been added to the adjunct bargaining unit as a question of accretion (Dec. 27). The Board uses the term "accretion" to refer "to the addition of employees into a

bargaining unit without an election.” AG Communications Sys. Corp., 350 NLRB 168, 182 (2007). That is what the Employer claims has occurred in this case. Hundreds of students who would otherwise have been classified as TAs are now classified as adjunct faculty (Dec. 13; Tr. 447-48, 649-50, 817-18; Er. Ex. 55). The Employer unilaterally decided to add these employees to the Local 7902 bargaining unit. Thus, the Acting Regional Director correctly treated this as an accretion issue.

As the Board held in Frontier Telephone of Rochester, Inc. 344 NLRB 1270 (2005), enfd. 2006 U.S. App. LEXIS 12443 (2nd Cir.), the Board is a reluctance to find an accretion

because accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, the accretion doctrine’s goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative. **Accordingly, the Board follows a restrictive policy in applying the accretion doctrine.** *Safeway Stores*, 256 NLRB 918 (1981); *Wackenhut Corp.*, 226 NLRB 1085, 1089 (1976). One aspect of this long-standing restrictive policy, which was recently restated in *E. I. DuPont de Nemours, Inc.* [341 NLRB 607 (2004)], has been to permit accretion ‘**only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted.**’ supra at 608, quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 948 (2003).

344 NLRB at 1271(emphasis added). Accord, Milwaukee City Center, LLC 354 NLRB No. 77 (9/21/2009), abrogated as a two-member decision, by New Process Steel v. NLRB, 560 U.S. ____, 130 S.Ct. 2635 (2010); CHS, Inc., 355 NLRB No. 164 (8/27/2010).

The Employer argues that graduate students are covered by the terms of the recognition clause of the adjunct collective bargaining agreement (NYU Br. 45). “The

determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards and criteria.” Super Valu Stores 283 NLRB 134, 135 (1987), quoting Marion Power Shovel Co., 230 NLRB 576, 577-78 (1977). Thus, the Acting Regional Director applied the correct legal standard in finding that graduate students who teach retain a separate identity from other employees.

In the accretion context, two factors have been deemed to be “critical:” employee interchange and common day-to-day supervision. Frontier Telephone at 1271; DuPont at 608. “[T]he absence of these two factors will ordinarily defeat a claim of lawful accretion. This is not to say that the presence of these factors will establish a claim of lawful accretion.” Frontier Telephone at 1271, n. 7.

The evidence with respect to the two “critical” factors is insufficient to establish an accretion. While there may be instances in which student and outside adjuncts share common supervision, this does not occur on a systematic or across-the-board basis. Moreover, there is one respect in which the supervision of student adjuncts and outside adjuncts differs substantially: hiring practices. Student adjuncts can and do use the contacts that they have established as students to obtain teaching positions. It is a part of the role of their mentors and faculty members to find teaching opportunities for them that will further their education. Given the critical role of teaching in graduate students’ education, faculty members actively seek opportunities for their students to gain teaching experience. (Tr. 913,1080). A faculty member seeking to place students will either recruit students on her own or through other members of the faculty (Tr. 583, 913, 1102). Dr. Renzi, the Associate Director of the MAP program, testified,

professors in the departments that supply faculty for the MAP program frequently “look at this as an opportunity to provide adjunct teaching opportunities for their graduate students....” (Tr. 1080). The record includes several examples of students who used contacts with faculty members in order to obtain teaching positions (Tr. 1276, 1356, 1531-32). Outside adjuncts do not enjoy the benefit of a system which obligates members of the University community to help them to find jobs.

With respect to the other critical factor, the Employer argues, “There is a high degree of interchange among student and non-student adjuncts (NYU Br. 49). In support of this assertion, the Employer cites to instances in which student and non-student adjuncts have taught similar courses. In the accretion context, the Board looks for evidence of temporary transfers of employees in the category sought to be added to the bargaining unit into positions in the established bargaining unit. Frontier Telephone, 344 NLRB at 1272. This is not possible with respect to the bargaining unit as defined by the Acting Regional Director, because a graduate student employee is subject to limits on the number of hours worked, which would prohibit him from teaching both a section and a stand-alone class (Dec. 22). Alternatively, the Union has proposed that the unit be defined to include all graduate student adjuncts. By definition, an employee cannot be both a graduate student adjunct and a non-student adjunct simultaneously.

In arguing that graduate students should be included in the adjunct bargaining unit, the Employer relies upon such factors as wage structure and benefit eligibility that result from the Employer's decision to reclassify TAs as adjuncts (NYU Br. 49-50). In determining whether to find an accretion, the Board gives little weight to factors such as wages and benefits that result from an employer's decision to treat a new group of

employees as part of the bargaining unit. Safeway Stores, Cinc., 256 NLRB 918, 919 (1981); Dean Transportation, 350 NLRB 48, 59 (2007).⁸

On the other hand, as found by the Acting Regional Director, graduate student have a separate bargaining history and a different relationship with NYU (Dec. 18, 27). In addition, the record establishes that there is substantial interchange between student adjuncts and RAs, another factor which supports a finding of a bargaining unit composed of student employees in these two classifications. According to data supplied by the Employer, in response to subpoena, covering only academic year 2009 and the Fall semester 2010:

- a) Of the 1244 graduate students who had adjunct appointments at any time during 2009, 157 or 12.6% also served as RAs during academic year 2009; of these, 35 held appointments as adjunct faculty and RAs during the same semester.⁹
- b) An additional 68 of those 1244 graduate students who served as adjuncts in 2009 held RA appointments in the Fall of 2010;
- c) There were 937 graduate student adjuncts during the Fall semester of 2010. Of these, 93 or 9.9% had served as Research Assistants during the previous academic year.

(Pet. Ex. 76).

For all of these reasons, the Acting Regional Director properly found that TAs converted to adjuncts were not accreted to the adjunct bargaining unit, and that they share a separate community of interest with other graduate student employees.

⁸ Moreover, while offered the adjunct benefits, most graduate student employees participate in the student health plan, which offers substantially different benefits (Tr. 780).

⁹ Of these, four were appointed as RAs and as adjunct faculty at different times during the semester and two only overlapped by a single day. The remaining 29 student employees worked simultaneously as RAs and adjunct faculty for periods ranging from a few weeks to a full year (Er. Ex. 117).

B. The Acting Regional Director Properly Considered Differences in Working Conditions that Result from the Fact that Graduate Assistants are Students as well as Employees

The Employer argues that it was improper for the Acting Regional Director to consider differences in the working conditions of employees that result from the fact that they are also students (NYU Br. 54-58). The Employer strenuously argues that Board precedent establishes that only terms and conditions of employment that arise directly out of the employment relationship can be considered in determining the community of interest among a group of employees. This argument is not supported by the cases cited by the Employer and is, in fact, contradicted by Board cases which have considered student status and other relationships between employees and the institution that employs them.

The Board should not ignore the fact that employee working conditions are different when they are enrolled as students at the institution where they work. The general rule is that the Board considers the relationship between the employees and the institution that employs them in determining community of interest. In most instances, employees have only one relationship with the institution that employs them: the employment relationship. As the Acting Regional Director recognized, graduate student employees have different interests precisely because, unlike other employees, they have a dual relationship with their employer. It was proper for the Acting Regional Director to base his unit determination on that dual relationship.

The Employer begins its argument by citing cases involving employees who also prisoners on work-release, Winsett-Simmons Engineers, Inc., 164 NLRB 611 (1967); Georgia-Pacific Corp., 201 NLRB 760 (1973), Rosslyn Concrete Construction Co. v. NLRB, 713 F.2d 61 (4th Cir. 1983); and employees who were also military personnel.

Lone Star Boat Mfg. Co., 94 NLRB 19 (1951), Terri Lee, Inc., 103 NLRB 995 (1953). In each of these cases, the Board found that it was the relationship between the employee and the institution that employed him, not his relationship to the prison or the military that determines whether he shares a community of interest with other employees.

The cases cited by the Employer all involve the impact of employees' relationship with another institution on the employment relationship. Most employees have a relationship with their employer that arises entirely out of the fact that they are employees. Graduate student employees have a different relationship with their employer because they have the dual relationship. Where employees have a dual relationship with their employer, the Board takes this into consideration in deciding whether the employee shares a community of interest with other employees.

Such a dual relationship may exist when an employee also has a familial relationship with management. While section 2(3) contains an explicit exclusion for individuals employed by their parents, the Board will also exclude employees from a bargaining unit based upon other familial relationships. Thus, the Board has excluded the sister of the principal owner of the employer, Luce and Son, Inc., 313 NLRB 1335 (1994); the son-in-law of the president, R&D Trucking, Inc., 327 NLRB 531 (1999); and the son of a supervisor and minority owner who was also the nephew of other owners. Midwestern Mining & Reclamation, Inc., 277 NLRB 221 (1985). See generally NLRB v. Action Automotive, Inc., 469 U.S. 490, 495 (1985), noting that, the closer the family relationship, the more likely the employee will be excluded from the bargaining unit. Thus, where an employee has a dual relationship with her employer, the Board will consider that relationship in determining whether she shares a community of interest

with other employees.

The Board also has a long history of considering the dual status of student employees in deciding whether graduate assistants share a community of interest with other employees. This is the true holding of Adelphi University, 195 NLRB 639 (1972), a precedent that was mischaracterized by the majority in Brown. In Adelphi, the Board held that teaching assistants had a separate community of interest from faculty members because the TAs were “primarily students.” 195 NLRB at 640. Among the factors cited by the Board in concluding that graduate assistants should be excluded from a faculty unit were that they “are graduate students working toward their own advanced academic degrees, and their employment depends entirely on their continued status as such.” Id. Similarly, the Board has considered “student status” in several other cases in excluding student employees from units of other employees at the universities where they were enrolled. See, e.g., Saga Food Serv. of Cal., 212 NLRB 786 (1974); Barnard Coll., 204 NLRB 1134 (1973); Cornell Univ., 202 NLRB 290 (1973); Georgetown Univ., 200 NLRB 215 (1972). Like family members, student employees have a separate community of interest because of their dual status.

In summary, the general principal to be derived from precedent is that the Board considers the relationship of a group of employees to the institution that employs them in deciding whether those employees share a community of interest with other employees. In the overwhelming majority of cases, employees have only one relationship to that institution: they are its employees. When situations arise in which the employees have a second relationship with that institution, the Board would have to

be willfully blind to ignore the effect of that dual status in deciding upon the scope of a bargaining unit.

The Employer also cites Boston Medical Center, *supra*, as a case in which student workers were included in a bargaining unit with other employees at the institution in which they study. Boston Medical, however, involved an acute care hospital, and the Board did not base its unit determination on traditional community of interest factors. Rather, the unit was based upon the Board's Final Rule on collective bargaining units in the health care industry, which established a unit of "all physicians" as the only appropriate unit of physicians at an acute care hospital. Despite the unit holding in Boston Medical, a different pattern of collective bargaining has developed. As reflected in the *amicus* brief of the Committee of Interns and Residents/SEIU, collective bargaining units limited to student physicians have been the norm based upon the agreement of the parties that student physicians have different interests from other physicians.

In conclusion, it was proper for the Acting Regional Director to consider students status in defining the appropriate unit. This is consistent with the bargaining history, Board precedent, and the pattern of bargaining that has evolved in another area where collective bargaining has been permitted to flourish among student employees.

V. THE SCOPE OF THE BARGAINING UNIT

The Employer argues that the Acting Regional Director's arbitrarily defined the bargaining unit by including certain hourly employees while excluding graduate student adjuncts who teach credit courses. The Acting Regional Director's unit determination is based upon two guiding principles that are consistent with Board precedent. First, he

has recognized the importance of a history of collective bargaining to unit determinations, See, Grace Indus., LLC, 358 NLRB No. 62 (2012). Consistent with this principle, he has attempted to re-establish, as nearly as possible, the collective bargaining unit that existed before NYU withdrew recognition from the Union. Second, as discussed above, he took into consideration the fact that employees who are also students have a dual relationship with their employer that affects their community of interest and differentiates them from other employees.

As we argue in Part III C of our principal brief, graduate student employees share a community of interest that arises out of the fact that they perform services related to and in furtherance of their education. The bargaining unit described by the Acting Regional Director is consistent with that principle. It includes hourly employees with the job title of “research assistant” and employees who provide assistance to a particular faculty member. These employees perform services that are related to their education (Pet. Ex. 56 at 17; Tr. 1385-86, 1403). The unit defined by the Acting Regional Director is designed to include those hourly graduate student employees identified in the record who perform services that are related to their education and who would have been included in the unit previously represented by the Petitioner.

The Employer argues that the unit described by the Acting Regional Director is inconsistent with University of West Los Angeles, 321 NLRB 61 (1996). There, the Board included students working in a library in a unit with other librarians. The Employer argues that this case is inconsistent with a *per se* rule excluding students from a unit with other employees. The Petitioner does not argue for such a *per se* rule, and the Acting Regional Director did not apply such a rule. The Union’s position is that

student status is a relevant consideration to deciding community of interest. Units of graduate assistants, excluding other employees, are appropriate because such units are comprised of employees who share a community of interest resulting from the fact that they are performing work that is related to their education. In University of West Los Angeles, the Board found that the student library clerks' employment was unrelated to their studies. Therefore, that case is consistent with our argument that the Board should define a unit of graduate assistants as employees of a university who perform work that is related to or that furthers their education.

Finally, the Employer argues that it was "illogical" for the Regional Director to exclude graduate student adjuncts who teach credit courses (NYU Br. 57). This guideline was selected by the Acting Regional Director to define the bargaining unit in a manner consistent with the unit previously represented by the Petitioner. The majority of the classes taught by TAs were recitation sections. However, the Petitioner agrees that it may be more logical for the Board to give greater weight to the dual interest as students and employees shared by all graduate student adjuncts and RAs, rather than attempting to draw too fine a line. Graduate students constituted a very small segment of the adjunct bargaining unit before the TA position was eliminated. Therefore, if the Board is persuaded by the Employer's argument on this point, it should define the bargaining unit to include all graduate student adjuncts as well as the other employees in the unit defined by the Acting Regional Director.

VI. CONCLUSION

The Board should reinstate the petition in Case No. 2-RC-23481 and direct an election in a unit composed of graduate student adjuncts, RAs, hourly graduate student

employees with the job title 'research assistant,' and hourly employees who job title demonstrates that they are providing assistance to a specific faculty member.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

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APPENDIX

A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

-----X
In the Matter of

THE TRUSTEES OF
COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK

Employer,

CASE NO. 2-RC-22358

-and-

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO

Petitioner.
-----X

**POST-HEARING BRIEF OF THE
TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK**

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II

STUDENTS SERVING AS GRAs MUST BE CONSIDERED TO BE EMPLOYEES UNDER THE NLRA TO THE SAME EXTENT AS TAs

Graduate students who provide research services to Columbia as Graduate Research Assistants ("GRAs") are indistinguishable from TAs who provide teaching services. If the Board determines that Columbia's TAs are "employees", then Columbia's GRAs must be held to be "employees" as well.

In *New York University*, 332 N.L.R.B. No. 111 (2000), graduate students who worked as science research assistants were held not to be "employees" under the Act because they did not "perform a service for the Employer." *See id.*, slip op. at 4 n.10.³⁶ The *NYU* decision relied upon the Board's 1974 decision in *Leland Stanford Junior University*, 214 N.L.R.B. 621 (1974), in which research assistants in physics were held not to be employees. As explained by Member John Fanning in a subsequent case, the *Stanford* decision was based on the fact that the research assistants did not perform a service for Stanford.³⁷ Fanning noted that under the NLRA, an employee is one who performs services for another, from whom he or she receives compensation. Fanning explained that:

³⁶ At the same time, the Board determined that Research Assistants in NYU's Departments of Psychology, Economics, and the Business School did provide a service to the University and were, therefore, "employees" included in the unit. *See NYU*, 332 N.L.R.B. No. 111, slip op. at 4 (2000).

³⁷ Fanning's analysis was cited favorably by the Board in *Boston Medical Center* and by the Regional Director in *NYU*. *See Boston Medical Center Corp.*, 330 N.L.R.B. No. 30, slip op. at 9 (1999); *NYU*, slip op. at 12, 16 (2000).

[I]n terms of the actual research conducted, Stanford was, essentially, a disinterested party. Stanford did not control the research, did not request the research, and, most significantly, did not receive remuneration from a third party for the particular research.

Cedars-Sinai Med. Center, 223 N.L.R.B. 251, 255 n.14 (1976) (Fanning, M., dissenting).

Here, in sharp contrast to *Stanford* and *NYU*, the record establishes overwhelmingly that Columbia's GRAs do provide a service to the University: they perform research and related work that the University is obligated to perform under the terms of its numerous externally-funded research grants. (Tr. 183-84 (Israel), 197, 205, 209-10, 226-27 (Sohn), 938-58, 961-65, 969-73 (Kahn), 1156-59 (Hood), 1303-05 (Laine), 1322-24, 1336-38, 1347-49 (McKeown), 1890-92, 1898-1901, 1905-14 (Fine), 2163-65 (Kelley), 2656-60 (Messer), 3006-08 (Bulinski), 3246-47 (Laine); EX 47 at 2) Furthermore, Columbia's GRAs are recruited to do the work, they perform the work under Columbia's control, and are compensated for the work the same as the TAs are "compensated."³⁸ And "most significantly," Columbia "receive[s] remuneration from a third party [usually a government agency] for the particular research." *Id.*

Indeed, Columbia, unlike *Stanford* and *NYU*, is anything but a "disinterested party" with respect to the GRAs' work. As Dr. Michael Crow, the University's chief research officer, testified, Columbia's nearly 600 GRAs play an "essential" role in performing the research and related work required by the \$300 million in faculty research grants (comprising some 15%

³⁸ EX 47, entitled "Regulations Governing Awards in the Graduate School of Arts and Sciences," states that in the Natural Sciences, "the stipend received by the Faculty Fellows is paid to them not only to support their studies but also for services rendered, *i.e.* for teaching/research assistance, and income taxes must be withheld from such payments"

of the University's annual budget) that Columbia is awarded annually. (Tr. 3384-85) "They are in many ways the key research performers to implement those grants." (Tr. 3385) Therefore, under the standard established by *NYU* and *Stanford*, Columbia's GRAs are "employees" within the meaning of the Act.

Research grants usually originate with an application submitted by a faculty principal investigator to a federal agency proposing to conduct certain research within a specific time frame. (Tr. 163-64 (Israel)) The application includes a request for funding for personnel who will be performing the work — such as GRAs, post-docs, and technicians — in the form of an itemized budget, and frequently identifies the responsibilities that will be performed by the individuals to be supported under the grant. (Tr. 164 (Israel); EX 6 at 5-6, EX 12 at § 2) In the case of a GRA, the grant typically pays the GRA's stipend and tuition.³⁹ (Tr. 178-81 (Israel), 1335-36 (McKeown)) Primary responsibility for supervision of all personnel conducting the proposed research rests with the faculty principal investigator. (Tr. 164-165 (Israel))

It is readily apparent upon even a cursory review of the grant proposals included in the record that GRAs play an essential role in Columbia's ability to secure research grants and provide the services required under those grants. For example, EX 7 is a grant application (that was funded) for research on "Mechanisms governing polarity in *Drosophila* oogenesis." (Tr. 168-72 (Israel)) The grant is requested by Columbia University, not an individual faculty

³⁹ The National Institutes of Health ("NIH"), which is part of the Department of Health and Human Services which funds most faculty grants in the Natural and Basic Sciences at Columbia, caps the total amount of stipend and tuition "compensation" that the University can charge an NIH research grant for a GRA at \$26,000 per year. NIH's December 2, 1998 announcement of the cap referred to the GRAs as "employees of the grantee institution." (EX 10)

member, and two graduate students are specifically included in the description of the personnel working on the grant. (EX 7 at 4) The description identifies these GRAs by name, describes the precise tasks that they will be performing and even identifies their qualifications to perform those tasks. *Id.*

The record includes numerous other funded grant proposals that commit Columbia to perform specific research with the assistance of GRAs. (EXs 8, 9, 13, 76, 88, 150, 156, 163, 180, 202) Payments to GRAs are incorporated in the itemized budgets of these grant proposals. GRA stipends are included under the "salary" heading and a separate reference to reimbursement for tuition expenses is incorporated under the "other" expenses heading. (EXs 8, 9, 13, 76, 88, 150, 156 at 22-26, 163, 202 at 28-33; Tr. 178-81 (Israel), 1335-36 (McKeown))

The grant applications also frequently make reference to specific graduate students and the specific tasks that they will perform. Graduate students are identified by name among the personnel to be supported by the grant or in the budget justification for personnel costs. (EXs 8 at 4, 9, 13 at 4, 76 at 4, 150 at 4, 22, 163 at 4, 6, 180 at 13, 202 at 34) The specific tasks to be performed by the named GRAs are summarized in the budget justification or project description sections of the grant proposals. (*Id.*; EXs 88, 156 at 22-26; Tr. 178-81 (Israel), 1335-36 (McKeown)) Where a GRA has special training or skills, or prior experience, those qualifications are highlighted in the grant application and in some cases copies of the student's curriculum vitae or detailed biographical sketches are included with the grant application. (Tr. 174 (Israel), 2873-75 (Krantz), 3245-47 (Laine); EXs 13 at 8-10, 156 at 11, 21, 163 at 27, 180 at 13, 44-45) This detailed information is included in grant applications because it strengthens the

application and increases the likelihood that the grant proposal will be accepted for funding. (Tr. 3246-47 (Laine))

Funded grants impose specific contractual obligations on Columbia University. (Tr. 3385 (Crow)) The University simply cannot charge a research grant for the salary or tuition of a graduate student who is not providing services in support of that grant. (Tr. 183-84 (Israel), 205 (Sohn)) To do so would violate "one of the basic tenets of grantsmanship and one of the basic principles" under which grants are administered. (Tr. 184 (Israel); EX 11 at 4) Not only must a GRA perform services that support a grant, those services must be *necessary* to the grant. (Tr. 184 (Israel), 205, 226 (Sohn), 3903-04, 3912-15 (Ruttenberg); EXs 11 at 4, 12 at § 2.1.1.1) The NIH Grants Policy Statement, which governs most faculty research grants in the Natural and Health Sciences at Columbia (Tr. 3400-01 (Crow), 3901-02 (Ruttenberg); EX 185 at 16), requires that a GRA perform "activities necessary to the grant". (NIH Grants Policy Statement, Part II: Terms and Conditions of NIH Grant Awards; Tr. 3913-15 (Ruttenberg)) This provision is derived from Office of Management and Budget ("OMB") Circular A-21 which applies to all federal research grants awarded to Columbia. (Tr. 3915 (Ruttenberg))⁴⁰ Cost Principles for Educational Institutions, 65 Fed. Reg. 48566-01 (Aug. 8, 2000).

Numerous witnesses testified to the essential nature of the services performed by GRAs. (Tr. 100-01 (Cohen), 174 (Israel), 974 (Kahn), 1159-60 (Hood), 1306-08, 1324-25,

⁴⁰ Indeed, in order to comply with OMB and NIH regulations, graduate students at Columbia who are working on and being supported by research grants are required to be appointed as GRAs because it is an "employee classification." (Tr. 3913 (Ruttenberg); EX 12 at § 2.1.1.1) New graduate students are informed that if they are appointed GRAs, income taxes will be deducted from their "salary check" and they will receive a W-2 Earnings Summary from the University. (Tr. 3917-21 (Ruttenberg); EX 227)

1339-42, 1348-49 (McKeown), 1902, 1917 (Flynn), 2163-64 (Kelley), 2489, 2494-96 (Shortliffe), 2661 (Messerli), 3002-04, 3009-10 (Bulinski), 3250, 3260 (Laine), 3412, 3555 (Levin)) For example, Professor Barry Honig described the work being done by Cinque Soto, a Ph.D. student beginning his third year in the Biochemistry and Molecular Biophysics Program. (Tr. 3601) Mr. Soto is serving as a GRA on an NSF grant in rapid computational analysis of biological function. (Tr. 3599-3601; EX 202) The purpose of this grant is to develop software tools to study proteins and nucleic acids and to develop databases that can be used to better understand how proteins and nucleic acids function. (Tr. 3600) Mr. Soto is responsible for writing some of the software that was promised under this grant. (Tr. 3601) He works under the direction and control of Professor Honig, the PI on the grant, performing tasks assigned by Professor Honig that are necessary for the grant. (Tr. 3602-03) Mr. Soto is still in the early stages of the dissertation process and Professor Honig assigns him tasks without regard to whether they may advance Soto's dissertation research. (Tr. 3603) Rather, Professor Honig's concern is that the work promised in the grant application is being performed. (Tr. 3601, 3603) In exchange for performing these tasks, Soto receives tuition support and a "salary". (Tr. 3603)

Psychology Professor Donald Hood described the work Xian Zhang has performed for him as a GRA on an NIH grant from the Eye Institute relating to retinal disease. (EX 76) Mr. Zhang began working on this grant as a first year Ph.D. student, "running" the subjects and collecting data. (Tr. 1157-59) As he became more advanced in his studies, Mr. Zhang assumed greater responsibility designing some of the experiments, supervising undergraduates in the lab and ultimately designing very sophisticated programs for new analysis of the collected data. (*Id.*) Professor Hood has assigned Mr. Zhang specific tasks, such as

calibrations of the computer equipment used in the tests they are running, and he supervises Mr. Zhang directly, meeting with him daily and setting deadlines for the completion of assignments. (Tr. 1163-65) While some segment of the tasks that Mr. Zhang has performed may be applicable to his dissertation research, he has also performed many tasks that are necessary for the grant but "will certainly not be applicable" to his dissertation. (Tr. 1165-66)⁴¹

To secure future funding for this research, Professor Hood must publish articles relating to his research. (Tr. 1162) Mr. Zhang has assisted Professor Hood with his publications both through the services he provided in the lab and by co-authoring several articles with Professor Hood. (Tr. 1162-63; EXs 76 at 7, 72 at 10-11, 77, 78) These articles were then referenced in Professor Hood's most recent application for renewal of the Eye Institute grant. (EX 76 at 5-7) The grant application specifically states the tasks that will be performed by Mr. Zhang and describes his training and ability to assume that responsibility. (Tr. 1160-61; EX 76 at 4) In exchange for his services, Mr. Zhang is compensated from funds provided by the grant. (Tr. 1166)

Professor Steven Kahn described the assistance he has received from five GRAs on a NASA grant for "Science and Calibration Support for the Reflecting Grade Spectrometer on the X-Ray Multi-Mirror Mission," which involves the calibration of an instrument designed to detect and perform spectroscopic analyses on the x-ray band on stars, galaxies and the like. (Tr.

⁴¹ For example, Professor Hood assigned Mr. Zhang to calibrate a color monitor, a highly technical responsibility that required knowledge of the monitor's physics as well as an understanding of the absorption characteristics of cells in the eye. Performing this task had nothing to do with Xiang's doctoral research but it was essential to the successful completion of an experiment required by the grant. (Tr. 1225-26)

938-41; EX 69) The GRAs each assisted Professor Kahn in performing specific tasks required under the grant. (Tr. 952, 954-55)

Two GRAs, Jean Cottam and Joshua Spodek, worked primarily on calibration of the instruments, which is crucial to understanding how the instruments operate, and interpreting the data. (Tr. 942-46) Cottam also worked on the assembly of the flight instrument itself, development of software and scientific analysis of the data, and wrote scientific papers associated with that work. (Tr. 943-45) John Peterson, another GRA, worked on the software and played a significant role in analysis of the scientific observations, as well as post-launch calibration of the instruments. (Tr. 947-49) Masao Sako primarily worked on the analysis of scientific observations particularly with regard to astrophysical issues. (Tr. 950) Finally, Peter Leutenegger has been working on interpreting the astrophysical observations and particular kinds of sources. (Tr. 951)

The tasks performed by these GRAs satisfied specific obligations enumerated in the scientific data analysis section of the grant proposal. (EX 69 at 3; Tr. 959-60) Their work was "crucial to the success of both the development of the instrument and its utilization to do astrophysical science" and it resulted in the publication of scientific papers which helped Professor Kahn to secure future grants and contracts for other experiments. (Tr. 953) Not all of the work done by the GRAs for the grant was related to their dissertations and some of it was "completely unrelated." (Tr. 957-58)

Similarly, Natalie Seiser has been working with Professor George Flynn as a GRA on a Department of Energy research grant on "Laser Enhanced Chemical Reaction

Studies." (Tr. 1895-96; EX 99) In the most recent grant proposal, Professor Flynn described four types of proposed experiments that would be funded with the requested grant money. (EX 99 at 8-18) Seiser performed the experiments identified as item 1 on the grant application, pertaining to probing angular momentum constraints. (Tr. 1898-1901; EX 99 at 8-12) The grant also funded the purchase of certain lasers that Seiser used in performing those experiments. (Tr. 1901; EX 99 at 47-48)

In addition to her completion of these necessary experiments, Seiser has performed various other tasks that were required for the grant. When she first began working on the grant, Seiser assisted another GRA operating lasers for his experiments. (Tr. 1907-08) She has chaired the group seminar for Professor Flynn's lab, organizing the weekly meetings and ensuring progress reports are ready. (Tr. 1898, 1913-14) She has also assisted Professor Flynn with preparation of slide material for him to use at various presentations, including the Department of Energy's annual combustion contractors meeting where he was expected to present a progress report on the grant work. (Tr. 1898-99, 1908-12) In addition, Seiser has supervised undergraduates in the lab and worked with an undergraduate last summer on a paper that satisfies item number 4 of the proposed experiments as outlined in the grant application. (Tr. 1899, 1905-07; EXs 99 at 18, 100) Finally, because Seiser is completing her dissertation and going on to further studies, she has been training the post-doctoral fellow who will be taking over her responsibilities on the grant. (Tr. 1914-16) None of these tasks were required for Seiser's dissertation. (Tr. 1893-95, 1905, 1908, 1910-12, 1914, 1916)

In fact, witness after witness testified — and it is undisputed on this record — that all GRAs perform work that is necessary to fulfilling Columbia's obligations under its research grants (Tr. 952, 974 (Kahn), 1160 (Hood), 1309, 1325, 1342, 1349 (McKeown), 1903, 1917 (Flynn), 2489, 2493-95 (Shortliffe), 2661-62 (Messori), 3004, 3010 (Bulinski), 3903-04 (Ruttenberg), 3260 (Laine), 3606 (Honig), 3385 (Crow), 205 (Sohn), 183-84 (Israel), 89 (Cohen)); and that if a GRA was not performing that particular work, it would be necessary to replace him or her — usually with another GRA or a post-doctoral fellow ("post-doc") who would be paid out of the grant to perform that same work. (Tr. 99-100 (Cohen), 952-53 (Kahn), 1160-61 (Hood), 1309-10, 1342-43, 1349, 1415 (McKeown), 1914-16 (Flynn), 2494 (Shortliffe), 2662 (Messori), 3004 (Bulinski), 3260 (Laine), 3601-02 (Honig))

Indeed, it is instructive to compare the GRAs with post-docs whom the Union contends are employees under the Act.⁴² GRAs and post-docs perform similar work and provide similar services to the University. (Tr. 2867-69 (Krantz), 3386, 3417-20 (Crow), 3604 (Honig)). As noted, a number of faculty principal investigators testified to the possibility of replacing a GRA on their grant with a post-doc. For example, Professor Flynn testified that when his GRA (Natalie Seiser) graduated, he attempted to recruit another graduate student to take over Seiser's work on the grant as a GRA. When he was unsuccessful in doing so, Flynn hired a post-doc to take over from Seiser. (Tr. 1914-16 (Flynn)) Other GRAs who have received their doctorates have continued to perform the same work on the grant in the position of post-doc. (Tr. 3603-04 (Honig), 3386-7 (Crow), 2828-29 (Krantz), 3008 (Bulinski); EX 202 at 34)

⁴² The term "post-doc" is frequently used at Columbia to refer to the title of post-doctoral research scientist.

During the hearings, the Union did not contest the overwhelming evidence that GRAs provide a service to Columbia. But the Union argues that the GRAs are nonetheless students and not employees because the work that the GRAs perform for Columbia is required for their degree.

The Union's position that TAs are employees because they provide a service while GRAs are not employees because they are merely doing that which is required for their degree is both factually incorrect and fundamentally inconsistent. It is incorrect because witnesses in many departments and programs testified that GRAs' research and related work is not limited to their own dissertations, including: Anatomy, Biology and Pathology (Tr. 3025 (Bulinski)); Biochemistry (Tr. 3251-53, 3264-66, 3277 (Laine)); Biostatistics (Tr. 3556 (Levin)); Chemistry (Tr. 1905-19 (Flynn)); Computer Science (Tr. 1313-15, 1329-30, 1345-46, 1351, 1398-99 (McKeown)); Environmental Health Sciences (Tr. 3503 (Brandt-Rauf)); Medical Informatics (Tr. 2489-92 (Shortliffe)); Neurobiology and Behavior (Tr. 2164-66, 2170-71, 2177-78, 2180 (Kelley)); Physics (Tr. 956-58, 967-68 (Kahn)); Psychology (Tr. 1165-66, 1174 (Hood)); and Sociomedical Sciences (Tr. 2653-54, 2663 (Messori)).⁴³ And it is inconsistent

⁴³ The Union's reliance on the description of a GRA that appears in the Faculty Handbook, as a graduate student "who is engaged in research that is in direct fulfillment of a requirement for [the] degree" (EX 2 at 121) is misplaced because the description does not state that a GRA performs such research exclusively. Indeed, in some situations the GRA research is entirely unrelated to their dissertations. (Tr. 2653-54, 2663 (Messori) ("[I]t has been the custom and tradition at the School of Public Health that graduate research assistants are hired . . . without any specific expectations that the research activities they do are necessarily related to their ultimate choice of dissertation topic."), 3503 (Brandt-Rauf)) In other departments, such as Population and Family Health, and Computer Science, masters students serve as GRAs and their GRA research clearly does not fulfill any academic obligations. (Tr. 1302, 1305, 1315 (McKeown); EX 194)

Further, as previously discussed, the tasks performed by doctoral students serving as GRAs that
(continued...)

because in many departments, teaching, like dissertation research, is a required component of the doctoral program, and service as a TA fulfills a degree requirement. (*See Point I(B), above*) The Union cannot have it both ways. Either the academic benefit that a graduate student derives from serving as a TA or GRA precludes a claim of employee status under the NLRA, or the academic benefit is merely incidental and TAs and GRAs must be equally recognized as employees based on their provision of services to the University.

The Union's remaining attempts to apply *NYU* here are equally unpersuasive because the facts herein are clearly distinguishable from those before the Board in the *NYU* case. Columbia's GRAs — unlike the science research assistants held not to be employees in *NYU* — work under the direction and control of faculty members, with consistent supervision (Tr. 953-54, 967 (Kahn), 1163-64 (Hood), 1310-11, 1326, 1343, 1350 (McKeown), 1903-04, 1917 (Flynn), 2659 (Messeri), 3004-05 (Bulinski), 3250-51, 3260 (Lloyd), 3385-86 (Crow)); perform specific tasks (Tr. 954-56, 974-75 (Kahn), 1164-65 (Hood), 1312, 1328-29, 1345, 1350-51

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(...continued)

are unrelated to their research are not mere preliminary or incidental matters that would be required of any student researcher, regardless of the source of his or her funding. Rather, GRAs are asked to perform these tasks because they are required under the grant. (Tr. 957, 1004-05 (Kahn), 1314-15, 1329-30 (McKeown), 1909-11 (Flynn), 1207-17 (Hood), 2165-66, 2180 (Kelley), 3251-53, 3264-66 (Laine); *see also* Tr. 1005 (Kahn) (if GRA Jean Cottam refused to perform tasks because they were not related to her dissertation, he "would conceivably not agree to continue paying the student as a GRA."), 3308 (Laine) (mundane support tasks required under the grant would be assigned only to students supported by that grant, because "they are being paid a salary to perform the services of that grant or contract . . ."), 2175-76 (Kelley) (discussing a non-GRA Fellowship student who, during his three years in Kelley's laboratory performed no support services.))

In any event, research done by GRA (like teaching done by a TA) — whether related to the student's dissertation or not — usually serves two purposes: it both fulfills the student's degree requirements and provides a service to the University with respect to the grant. In the case of the TA, the student's teaching both trains the student and usually fulfills a degree requirement; while also providing a service to the University.

(McKeown), 2492-93, 2663 (Messori)); are required to commit a set number of hours to perform the required work (EX 12, Sec. 3.6.2.2.5; EX 50 at 3); and are required to meet deadlines. (Tr. 956, 967, 975 (Kahn), 1164-65 (Hood), 1312, 1328-29, 1345, 1350-51 (McKeown), 2492-93 (Shortliffe), 3251, 3266 (Marcuse), 3386 (Lloyd)) *See NYU*, slip op. at 15-16. And, of course, most importantly, Columbia's GRAs (unlike those at NYU) provide services to the University.

Accordingly, if the Board determines that Columbia's TAs are employees who are subject to collective bargaining, then the GRAs at Columbia must also be considered employees within the meaning of the NLRA. Like research assistants in NYU's Psychology and Economics departments and Stern School of Business, GRAs in departments throughout Columbia provide an important service to the University in exchange for "compensation." They thereby satisfy the classic definition of an employee, and the import of their role is comparable to (if not more important than) that of the TAs throughout the university whom the Union contends must be considered employees.

CONCLUSION

The vast majority of Columbia's graduate students serve as Teaching Assistants as a required and integral component of their advanced educational programs. They teach, for the most part, while they are taking classes and as part of their regular academic curriculum. They are not paid in exchange for their teaching services, but receive a uniform amount of financial aid, which does not vary regardless of whether they have a teaching appointment in a particular semester.

All of these facts distinguish TAs at Columbia from those in the *NYU* case, and establish that Columbia's TAs should not be treated as "employees" with the right to engage in collective bargaining. The petition, therefore, should be dismissed.

Should the Regional Director disagree, and find that Columbia's TAs are "employees", then any appropriate bargaining unit should include:

- (i) Graduate Research Assistants, who must be treated as "employees" to the same extent as TAs, and who share an inseparable community of interest with TAs; and
- (ii) GRAs and TAs at the Health Sciences campus, and the Lamont Doherty Earth Observatory and Nevis Laboratories, as well as those on the Morningside Heights campus, all of whom share a close community of interest; and
- (iii) all graduate students serving as TAs, regardless of whether they have official appointments in the University Personnel Information System.

Any appropriate unit should exclude:

- (i) Undergraduate TAs who should not be treated as “employees” with the right to engage in collective bargaining, and who do not share a community of interest with graduate TAs; and
- (ii) Students appointed to temporary positions in the Film Division of the School of the Arts, the School of International and Public Affairs, the Law School, the Summer Session and the Summer Program for High School Students.

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